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April 22, 2009

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Implementation of the Cable Television Consumer Protection and Competition Act of 1992 (MB Docket No. 07-29); Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements (MB Docket No. 07-198)

Dear Ms. Dortch:

Today, Will Johnson, Mark Montano and I met with the following people from the Media Bureau: Bob Ratcliffe, Nancy Murphy, Mary Beth Murphy, Steve Broeckaert, and David Konczal. We discussed the video-related issues included in the attached letter. In particular, we urged the FCC to address matters related to video service cancellations, retention marketing and program access, and to adopt policies that facilitate consumer choice and enhance video competition.

Sincerely,

Attachment

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April 22, 2009

Ex Parte

Michael J. Copps
Acting Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: **Local Number Portability Porting Interval and Validation Requirements (WC Docket No. 07-244); Implementation of the Cable Television Consumer Protection and Competition Act of 1992 (MB Docket No. 07-29); Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements (MB Docket No. 07-198)**

Dear Chairman Copps:

Recent press reports suggest the Commission is considering potential changes to the number porting standard interval at an upcoming meeting. But that issue – i.e., the time it takes customers to switch providers – cannot be addressed in a vacuum. Cable companies enjoy significant advantages over their direct competitors when marketing to consumers and with respect to access to "must have" programming that they control, which deny consumers the full benefit of even-handed competition.

The Commission should address these issues in conjunction with one another with the following objectives in mind:

- Requiring *all* service providers, regardless of their status as incumbents or new entrants, urban or rural, to play by the same rules;

- Facilitating the ability of all customers to switch providers for video, voice and bundled services alike; and

- Allowing all customers to enjoy the benefits of fair competition on the merits of competitors' offerings.

Accordingly, while we do not believe shortening the standard porting interval for simple ports is necessary, if the Commission does so, it should ensure that all providers comply with the same rules. In addition, the Commission should: (i) ensure that all providers are subject to the same rules governing marketing to customers, and departing customers in particular, for voice, video and bundled services alike; and (ii) prohibit cable incumbents from refusing to provide competing providers with access to regional sports programming they own or control.

Local Number Portability (LNP). While decreasing the time to switch providers may benefit customers in theory, it is not at all clear that reducing the standard interval from four business days to two business days or shorter would achieve that goal. If the Commission nevertheless reduces the standard interval, it is critical that the same rules apply to all providers, and that the Commission provides adequate time to implement the change.

As an initial matter, the cable incumbents and other providers already receive the porting intervals they request. Customers care more that an order is completed when its new provider says it will be than about the number of days the number port may take. In order to provide themselves with time to complete their installation, cable companies and other providers select due dates longer than the first available due date for more than 90% of the port requests they submit to Verizon. And, for Verizon's part, it completes all porting-out obligations by the date selected 99% of the time.

Certain wireless providers, which may not need as much time as cable incumbents to establish a customer's service, have argued that wireline-to-wireless ports should not take much longer than the few hours it takes for wireless-to-wireless ports. But there are a number of steps that are required for wireline-to-wireless ports that are not required for wireless-to-wireless ports, including the physical disconnection at the frame, changing the 911 database, changing the directory listing, and executing the 10-digit trigger. While a large and increasing number of customers have cut the cord and moved solely to wireless for their telephone service, few actually port their numbers to wireless phones. During the first three quarters of 2008, for example, wireline-to-wireless ports comprised only 1% of all ports. In addition, these customers are not without wireless service while waiting for the port. Wireless providers are able to immediately provide service to new customers by giving them a temporary number, which provides an option to customers who want to immediately be able to make outgoing calls and receive incoming calls before the port takes place. There is no indication that a material number of customers would change their mind about switching from wireline to wireless service simply because it may take the current standard interval's four days to receive incoming calls at the ported number. Verizon's affiliate Verizon Wireless has not observed this occurring in the market.

Rather, the LNP issue that affects Verizon Wireless and its new customers the most is the frequent delay (beyond the current interval) on wireline-to-wireless ports by some carriers, particularly rural carriers. Verizon also continues to experience the delays in wireline-to-wireline ports by cable companies and others that it described to the Commission last year.[1] Accordingly, an important first step is to require all providers to comply with the existing intervals. But regardless of whether the Commission retains the current interval or shortens it, the Commission should make clear that all providers must comply with the same rules. There is

[1] *See generally* Comments of Verizon, *Local Number Portability Porting Interval and Validation Requirements,* WC Docket Nos. 07-244 (Mar. 24, 2008).

no reason why a customer leaving Verizon should enjoy a faster change in providers than a customer coming to Verizon, as is often the case today.

Modifying the current standard interval would also involve significant costs and could not be done overnight given the myriad systems and processes that would have to be modified, tested, and perfected to maintain Verizon's high level of on-time performance today. In light of the potential benefit to only a discrete minority of customers, at most, these significant costs are unwarranted. Accordingly, for all these reasons, if the Commission were to nonetheless shorten the interval, any new interval should apply to all providers – cable or telco, urban or rural – and the Commission should allow adequate time for all concerned to implement the systems and processes required to meet the new requirement.

Service Cancellations and Retention Marketing. While the cable incumbents already obtain the intervals they request for number ports, they also enjoy significant advantages when it comes to the treatment of customers who are changing providers. Unlike for voice customers, there is no process for new video or broadband providers to submit a disconnect order on the customer's behalf, which makes the process of switching providers more complicated for the customer.

The different rules with respect to marketing to customers who are changing providers while their change in service provider is being effectuated also advantage cable incumbents. Although Verizon remains convinced that all consumers receive the greatest benefit when they are able to receive complete information about all the competitive options available to them, the Commission has reached a different conclusion with respect to departing customers for voice *telephone* service. As a result, Verizon's ability to market to departing customers is strictly limited, but cable incumbents can engage in aggressive retention marketing when the customer calls to schedule the cancellation of the service and throughout the period that the change is being effected. For example, just last year, Comcast announced a "retain-at-any-cost" customer retention program that would "be the single-most aggressive" program in the industry.[2] And other cable incumbents engage in similar retention marketing efforts. The cable companies themselves have openly bragged about this advantage: "[Comcast division president Mike] Doyle said that since Comcast [subscribers] call Comcast directly to disconnect, the MSO will not have the same problem that Verizon had."[3]

While all voice providers must abide by the same marketing rules for voice service, in today's marketplace where telephone companies and cable incumbents sell the same bundles of services to an increasing number of customers,[4] the rules do not affect cable incumbents and telephone companies equally. Telephone companies' retention marketing efforts would most frequently be directed at departing *voice* customers; cable's retention marketing efforts at departing *video* customers. While many customers switching voice service from traditional telephone companies do not purchase other services from that company, only a miniscule percentage of cable incumbents' voice customers are voice-only. Thus, customers departing

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[2] Brian Santo, *Cable Show: Comcast To Try Win-at-Any-Cost Retention Program*, CedMagazine.com, http://www.cedmagazine.com/Cable-Show-Comcast-win-at-any-cost.aspx (May 20, 2008).

[3] *Id.*

[4] A recent study showed that almost two-thirds of households in 2008 purchase multiple services from one provider. *See* IDC, *U.S. Service Provider Churn Synopsis* at 15 (Jan. 2008).

from telephone companies typically cannot receive retention offers while customers departing from cable companies typically can – even though both companies would be attempting to sell the same bundle of voice, video, and broadband services.

But some cable incumbents are not content even with that advantage, and have undertaken practices to evade even the Commission's ruling with respect to departing voice telephone customers. Specifically, the cable incumbents have used the fact that a customer is porting his or her number to Verizon to send emails or letters to their departing voice customers threatening the customers with increased prices for non-voice services and/or early termination fees. For example, Cablevision previously emailed departing customers stating, "We have recently received a request from Verizon NY to port your . . . telephone number 516-xxx-xxxx to that service provider effective 03/03/2009." The email then continued, "Please be aware that, by disconnecting your …service, you may negatively affect your monthly Cablevision bill." Cox has sent similar notices. When customers called to inquire about the correspondence, the companies could then attempt to retain them.

Accordingly, as Verizon explained in its pending petition for declaratory ruling, the Commission should make clear that all providers are subject to the same rules when it comes to marketing to departing voice customers, and that the same cancellation and marketing rules apply equally to both departing telephone customers and departing video customers.

Program Access. The cable incumbents continue to obtain an unfair marketing advantage by refusing to provide new entrants such as Verizon with access to regional sports programming that they own or control.

In some areas, cable incumbents have refused to provide access to this programming at all, while in others, they have refused to provide access to the high definition (HD) format of the programming that consumers want to display on their high definition televisions. For example, AT&T has documented Cox's refusal to provide access to San Diego Padre baseball games.[5] In our case, Cablevision refused to provide access to its regional sports channels, and agreed to do so only after we filed a program access complaint. Even then, Cablevision would only agree to provide access to the standard definition format of its regional sports programming, and has continued to withhold access to the HD format of that same programming (even though it provides the programming to other non-overlapping cable incumbents).[6]

The Commission has previously concluded that regional sports networks (RSNs) are a unique form of "must-have programming"[7] that is critical for new entrants to compete effectively. Indeed, without access to the games of local sports teams (many of whom compete in facilities funded by taxpayer dollars), many viewers will not consider a competing provider's video services. And, unlike many other types of programming, sports programming is truly unique and a provider denied access to regional sports programming has no way of duplicating or providing an acceptable alternative.

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[5] *See AT&T Services, Inc. v. CoxCom, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 2859, ¶ 7 (2009).
[6] *See* Ex Parte Letter from Leora Hochstein, Verizon, to Marlene Dortch, FCC, MB Docket Nos. 07-29, 07-198 (July 17, 2008).
[7] *See, e.g., Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17,791, ¶ 39 (2007).

Similarly, the carriage of desirable programming, such as regional sports, in high definition is increasingly essential to consumers. As the Commission is aware, consumer demand for a robust selection of HD programming is skyrocketing. More than 45 percent of American households have an HD television ("HDTV") set, up from less than 20 percent in 2006.[8] Nielsen data show higher levels of sports viewing and engagement in HD homes, with ratings for sports events 20 percent higher in HD homes compared to U.S. households as a whole.[9] Therefore, denying access to regional sports programming in HD is a direct attempt to handicap competitive entrants.

Cable incumbents are well aware of the harm inflicted on competitive providers when they are denied access to regional sports programming, including when they are denied the HD format of regional sports. In fact, Cablevision trumpets to consumers and analysts that it is the only source within its territory for receiving all nine local teams in New York City in HD. One Cablevision executive described its RSNs as the "most valued and popular sports programming" in New York.[10] In explaining how it would fend off competition from Verizon, Cablevision's chief operating officer recently touted the competitive importance of the HD formats of regional sports, stating: "We have our sports channels in high definition. So four of the nine professional sports teams in New York. If you want to see them in HD, you have to get them from us."[11]

As their own statements make clear, both the purpose and effect of the cable incumbents' refusal to provide access to this unique form of programming is to prevent or inhibit new entrants from providing their competing services to consumers. Indeed, for consumers who do not view a competing service as a meaningful alternative because it does not include local sports teams (or does not include them in high definition), then the competing provider will be unable to provide either that or any other programming to those consumers. As a result, the cable incumbents are able to deny those consumers a meaningful competitive choice and the resulting benefits.

Typically, the cable incumbents who withhold regional sports programming from competitors nonetheless claim that their conduct is immune from Commission action because it is not delivered by satellite and falls within Section 628's so-called "terrestrial loophole." Or, as in Cablevision's case, they admit that the channel is delivered by satellite and subject to the program access rules and provide access to the satellite-delivered standard definition format of the programming, but they seek to evade those rules by delivering just the "HD feed" of the programming by fiber and denying that format of the programming to competitors.

In reality, this is precisely the type of conduct that Congress outlawed. And while that may be most obvious when a cable incumbent moves a particular format of regional sports programming to terrestrial delivery in a blatant effort to evade the program access rules, it also is true of regional sports programming generally. Indeed, Congress prohibited all "unfair methods

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[8] *See, e.g.*, Simon Flannery et al., Morgan Stanley, *Broadband Outlook: Recent Sell-Off an Opportunity in Recurring Revenue Models* at 11, Exhibit 25 (Oct. 17, 2008); Walter Mossberg, *Family Snapshots in the Splendor of HD*, Wall Street Journal, http://online.wsj.com/article/SB122766053302758377.html (Nov. 26, 2008).
[9] Nielsen Special Report, *2008 a Banner Year in Sports*, http://pl.nielsen.com/site/documents/2008ABannerYearinSportsDecember2008.pdf at 3-4 (Dec. 2008).
[10] R. Ortega and J. Furse, *Cable War Strands Mets Fans*, New York Daily News (Aug. 2, 2004) (quoting Mike McCarthy, President, MSG Network).
[11] Statement of Tom Rutledge, COO, Cablevision Systems Corp., Thomson StreetEvents, *CVC- Cablevision Systems Corp. at UBS Global Media and Communications Conference*, at 11 (Dec. 8, 2008).

of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent" a competitive video provider from offerings its services "to subscribers or consumers."[12] And denying access to such programming necessarily inhibits competitors' ability to provide all forms of programming – including satellite delivered programming – to consumers, in violation of the statute. Accordingly, the cable incumbents' actions violate the statute, and the Commission should expressly confirm that that is so.

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For all the reasons explained above, whether the standard interval for simple number ports should be shortened is not an issue that can be viewed in isolation. To ensure that customers receive the benefits of fair and even-handed competition, the Commission should address concurrently the significant marketing advantages that cable already enjoys under existing rules in the manner outlined above.

Sincerely,

Susanne Guyer

cc: Commissioner Adelstein
Commissioner McDowell
N. Alexander
R. Brioche'
R. Chessen
S. Deutchman
A. Giancarlo
R. Harold
R. Ratcliffe
J. Schneider
M. Stone
J. Veach

[12] *See, e.g., DirecTV v. Comcast*, 15 FCC Rcd 22,802, ¶ 13 (2000) (citing 47 U.S.C. § 548(b)).